No. 91-1229

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, by and through
INTERNAL REVENUE SERVICE, PETITIONER

v.

BRUCE J. MCDERMOTT and BETTY MCDERMOTT,
and ZIONS FIRST NATIONAL BANK, N.A.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

KENT L. JONES
Assistant to the Solicitor General

WILLIAM S. ESTABROOK
BRIDGET M. ROWAN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether, under Section 6323(a) of the Internal Revenue Code, 26 U.S.C. 6323(a), a judgment lien of a private creditor that predates a federal tax lien has priority over the tax lien with respect to real property interests acquired by the taxpayer after notice of the tax lien was duly filed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulation:

In the Supreme Court of the United States

OCTOBER TERM, 1991

No.

UNITED STATES OF AMERICA, by and through INTERNAL REVENUE SERVICE, PETITIONER

v.

BRUCE J. MCDERMOTT and BETTY MCDERMOTT, and ZIONS FIRST NATIONAL BANK, N.A.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 945 F.2d 1475. The opinion of the district court (App., *infra*, 16a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 25a-26a) was entered on October 2, 1991. On December 19, 1991, Justice White extended the time for filing a petition for a writ of certiorari to and in-

cluding January 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 6321 of the Internal Revenue Code, 26 U.S.C. 6321, provides:

> LIEN FOR TAXES.
>
> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

2. Section 6323(a) of the Internal Revenue Code, 26 U.S.C. 6323(a), provides:

> VALIDITY AND PRIORITY AGAINST CERTAIN PERSONS
>
> (a) *Purchase[r]s, Holders of Security Interests, Mechanic's Lienors, and Judgment Lien Creditors.*—The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.

3. Section 301.6323(h)-1(g) of the Treasury Regulations on Procedure and Administration, 26 C.F.R. 301.6323(h)-1(g), provides:

> *Definitions.*
>
> * * * * *

> (g) *Judgment lien creditor.* The term "judgment lien creditor" means a person who has obtained a valid judgment, in a court of record and of competent jurisdiction, for recovery of specifically designated property or for a certain sum of money. In the case of a judgment for the recovery of a certain sum of money, a judgment lien creditor is a person who has perfected a lien under the judgment on the property involved. A judgment lien is not perfected until the identity of the lienor, the property subject to the lien, and the amount of the lien are established. Accordingly, a judgment lien does not include an attachment or garnishment lien until the lien has ripened into judgment, even though under local law the lien of the judgment relates back to an earlier date. If recording or docketing is necessary under local law before a judgment becomes effective against third parties acquiring liens on real property, a judgment lien under such local law is not perfected with respect to real property until the time of such recordation or docketing. If under local law levy or seizure is necessary before a judgment lien becomes effective against third parties acquiring liens on personal property, then a judgment lien under such local law is not perfected until levy or seizure of the personal property involved. The term "judgment" does not include the determination of a quasi-judicial body or of an individual acting in a quasi-judicial capacity such as the action of State taxing authorities.
>
> * * * * *

STATEMENT

1. The Internal Revenue Service (IRS) and Zions First National Bank (Bank) were creditors of Bruce and Betty McDermott. The Bank obtained a state

court judgment for $67,977 against the McDermotts on June 22, 1987, and docketed its judgment in the records of Salt Lake County, Utah, on July 6, 1987. On September 9, 1987, the IRS filed notice of its federal tax lien in the county records. The federal tax lien, in the amount of $103,657, reflected the McDermotts' outstanding federal income tax liabilities for 1977 through 1981 (App., *infra*, 2a-3a, 17a).

On September 23, 1987, after notice of the private and federal liens had both been properly filed, the McDermotts acquired certain real estate located in Salt Lake County (the "South Street property").[1] The McDermotts then resold the property on March 4, 1988. Based upon the liens of record, the IRS and the Bank asserted conflicting claims in the sale proceeds (App., *infra*, 2a-3a, 18a)

2. To resolve the conflicting claims, the McDermotts filed this interpleader action in state court. The United States removed the case to the federal district court, which held that the Bank had the superior claim to the fund (App., *infra*, 16a-24a). The court determined, under Utah law, that the docketing of the Bank's judgment created a lien in its favor only with respect to real property interests and that the McDermotts had no real property interest in the South Street property at the time the judgment was docketed (App., *infra*, 20a). See note 1, *supra*. The district court concluded, however, as a matter of federal law,[2] that the Bank's judgment lien nonetheless had priority as to "all real property then owned and *thereafter* acquired by the McDermotts as of July 6, 1987, the date of docketing" (App., *infra*, 22a). The court concluded that the priority of the liens in *all* real property then held, or thereafter acquired, by the McDermotts should be resolved under the rule of "first in time, first in right" (*ibid.*). Because the federal tax lien was not filed until after the Bank's judgment had been recorded, the district court held that the Bank's judgment lien had priority over the federal tax lien and must be satisfied in full prior to any distribution to the IRS (App., *infra*, 22a-23a).[3]

[1] In 1981, the McDermotts, as fee simple owners of this same property, had entered into a contract of sale with buyers Ron W. Christensen and Gary L. Carter. Upon their entering into this contract, the McDermotts' interest in the property became an interest in personalty under Utah law, although they still retained legal title to the property as security for the purchase price. See *Cannefax* v. *Clement*, 818 P.2d 546 (Utah 1991), aff'g 786 P.2d 1377, 1380 (Utah App. Ct. 1990); *Butler* v. *Wilkinson*, 740 P.2d 1244, 1254 (Utah 1987). On September 23, 1987, after the buyers defaulted, the McDermotts reacquired the property through foreclosure (App., *infra*, 3a-4a, 17a-18a).

[2] The existence and scope of a private lien are determined under state law. The competing priority of the private and federal lien is determined as a matter of federal law. See *United States* v. *City of New Britain*, 347 U.S. 81 (1954); *Texas Oil & Gas Corp.* v. *United States*, 466 F.2d 1040, 1047-1051 (5th Cir. 1972), cert. denied, 410 U.S. 929 (1973).

[3] Even though the government's tax lien attached to all of the McDermotts' real and personal property, including "their sellers' interest in the subject property," the district court viewed this case simply as one involving competing liens in the real property acquired by the McDermotts after both liens had been filed (App., *infra*, 21a, 22a). The court concluded that the government waived any claim based upon the prior attachment of the tax lien to the taxpayers' interest in the sale contract on the propery by stipulating in the escrow agreement that the parties' priorities are to be determined "as they existed against the real property as of September 23, 1987" (App., *infra*, 18a-19a & n.2).

We submit that the district court erred in reaching that conclusion, for the escrow agreement also provides that "[n]ei-

3. The court of appeals affirmed (App., *infra*, 1a-15a). Although noting that this Court has not addressed the particular situation presented in this case —where a judgment lien and a later-filed tax lien give rise to conflicting claims to after-acquired property—the court of appeals nonetheless interpreted *United States* v. *Vermont*, 377 U.S. 351 (1964), to stand for the proposition that a "non-contingent" lien on all of a person's real property that is "perfected prior to the federal tax lien, will take priority over the federal lien, regardless of whether after-acquired property is involved" (App., *infra*, 10a). The court of appeals held that, because the Bank's lien was "non-contingent" (in the sense that the judgment had been properly docketed, was specific in amount, and

---

ther party hereto waives any rights, defenses and claims that they may have had * * * in and to the real property, such rights being reserved and shall apply to the cash proceeds being held in escrow in substitution of the subject real property" (App., *infra*, 6a). In our view, this case should have been decided in favor of the United States on the ground that its lien attached to the taxpayers' interest in the property before the taxpayers converted that interest into a real property interest—the only type of interest to which the Bank's lien could have attached. See note 1, *supra*. Under the district court's analysis of the escrow agreement, however, the government's tax lien was not treated as a continuation of its lien against the taxpayers' personalty interest in the contract of sale, but as if it had newly attached to the property only as of the time it was converted into a real property interest. The court of appeals accepted the district court's findings on the interpretation of the escrow agreement (App., *infra*, 6a).

It is, of course, only as a result of the lower courts' interpretation of the escrow agreement that the "after-acquired" property question arises in this case. Since the analysis of the escrow agreement presents narrow issues that lack general importance, however, we do not seek further review of the lower courts' interpretation of that agreement.

was fully enforceable against any real property owned or subsequently acquired by the McDermotts), the Bank's lien had priority even with respect to property first acquired by the McDermotts after the federal tax lien had been perfected (App., *infra*, 11a-13a).[4]

REASONS FOR GRANTING THE PETITION

The court of appeals held that a judgment creditor's claim has priority over a subsequently filed federal tax lien even for real property acquired by the taxpayer *after* notice of the federal tax lien was properly filed. This holding is squarely in conflict with the decision of the Iowa Supreme Court in *Iowa Fair Plan* v. *United States*, 257 N.W.2d 626, 629 (1977), and also conflicts with the reasoning of *MDC Leasing Corp.* v. *New York Property Insurance Underwriting Association*, 450 F. Supp. 179 (S.D.N.Y. 1978), aff'd per curiam, 603 F.2d 213 (2d Cir. 1979); *United States* v. *Graham*, 96 F. Supp. 318 (S.D. Cal. 1951), aff'd *sub nom. California* v. *United States*, 195 F.2d 530 (9th Cir.), cert. denied, 344 U.S. 831 (1952); and *Southern Rock, Inc.* v. *B & B Auto Supply*, 711 F.2d 683 (5th Cir. 1983).

The issue presented in this case is of signficant, recurring administrative importance, for it affects many thousands of federal tax liens competing with judgment creditor claims to property acquired after the liens have been perfected. In the absence of an

---

[4] The court of appeals also rejected (App., *infra*, 13a-14a) the government's alternative argument, based on the Fifth Circuit's decision in *Southern Rock, Inc.* v. *B & B Auto Supply*, 711 F.2d 683 (1983), that, even if the tax lien is not entitled to priority, the Bank and the IRS should be viewed as creditors with simultaneously attaching liens in the South Street property and should share *pro rata* in the fund generated by that property.

authoritative decision from this Court, the continuing uncertainty resulting from the disparate decisions of the lower courts will generate further litigation and will cause both lien claimants and taxpayers to receive uneven treatment based solely on the happenstance of their geographical location.

1. Section 6321 of the Internal Revenue Code grants the United States a lien "upon all property and rights to property, whether real or personal" belonging to a taxpayer who, after demand, fails to pay taxes owed to the United States. 26 U.S.C. 6321. Although this lien generally enjoys a high priority under federal law, Section 6323(a) of the Internal Revenue Code provides that the federal tax lien "shall not be valid" against certain secured creditors, including a "judgment lien creditor," until notice of the federal lien is properly filed. 26 U.S.C. 6323(a).

In the present case, the following facts were not disputed (App., *infra*, 2a-3a): (i) the Bank possesses a valid judgment lien under state law in real property owned by the taxpayers; (ii) the United States possesses a valid tax lien under Section 6321 of the Internal Revenue Code in all property and rights to property of the taxpayers; (iii) the Bank properly filed notice of its lien before the United States filed notice of its lien; and (iv) the real property to which these liens now apply was acquired by the taxpayers *after* both the judgment lien and tax lien had been properly filed. Based upon these undisputed facts, the court of appeals erred in concluding that the federal tax lien was not entitled to priority in this case.

a. In a case involving exactly these same circumstances, the Supreme Court of Iowa held in *Iowa Fair Plan* v. *United States*, 257 N.W.2d 626 (1977), that the later-filed federal tax lien has priority as a matter

of federal law in the after-acquired property of the taxpayer. As the Iowa court observed (*id.* at 629), the decisions of this Court have established that a first-filed private lien has priority over a later-filed federal tax lien only if the private lien has "attached to the property in question and bec[o]me choate" before the federal lien is filed. *United States* v. *Pioneer American Insurance Co.*, 374 U.S. 84, 88 (1963) (quoting *United States* v. *City of New Britain*, 347 U.S. 81, 86 (1954)). For a private lien to be "choate" under these decisions, it must specify "the identity of the lienor, the property subject to the lien, and the amount of the lien" (347 U.S. at 84).[5] Since a property right must "exist before the lien attaches to it," a private lien is necessarily "inchoate as to property rights which have not yet arisen." *Iowa Fair Plan* v. *United States*, 257 N.W.2d at 629. When the property right first comes into existence after both the private and federal liens have been filed, the preexisting liens then "attach immediately to the new property" (*ibid.*). As the result (*id.* at 629-630),

> [t]he liens become choate in the new property interest at the same time. Because the state lien did not become choate before the federal lien, the federal lien has priority * * *.

In *United States* v. *Graham*, 96 F. Supp. 318, 321 (S.D. Cal. 1951), aff'd *sub nom. California* v. *United States*, 195 F.2d 530 (9th Cir.), cert. denied, 344 U.S. 831 (1952), and in *MDC Leasing* v. *New York Property Insurance Underwriting Association*, 450 F. Supp.

---

[5] Treasury regulations elaborate this principle by specifying that a "judgment lien is not perfected until the identity of the lienor, the property subject to the lien, and the amount of the lien are established." 26 C.F.R. 301.6323(h)-1(g).

179, 181 (S.D.N.Y. 1978), aff'd per curiam, 603 F.2d 213 (2d Cir. 1979), the courts reached the same conclusion that, when the federal tax lien and the private lien attach to the property at the same time, regardless which lien was *filed* first, the federal lien prevails. As the court held in *MDC Leasing* (450 F. Supp. at 181):

> [a] federal tax lien takes priority over competing liens unless the competing lien was choate prior to the attachment of the federal lien * * *.

b. The court of appeals reached a different conclusion in this case. Relying on *United States* v. *Vermont*, 377 U.S. 351 (1964)—which held that a state lien in "all" of the taxpayer's property sufficiently identifies the "property subject to the lien" to be "choate" as required by the *City of New Britain* case (377 U.S. at 354, 358-359)—the court of appeals concluded that the judgment lien in the taxpayers' real property was "choate" even as to real property the taxpayer did not own but later acquired (App., *infra*, 10a).[5] Since, the court reasoned, the judgment lien

[5] The court of appeals cited *Wisconsin* v. *Bar Coat Blacktop, Inc.*, 640 F. Supp. 407, 414 (W.D. Wis. 1986), *McAllen State Bank* v. *Saenz*, 561 F. Supp. 636, 639 (S.D. Tex. 1982), and *United States* v. *Fleming*, 474 F. Supp. 904, 906 (S.D.N.Y. 1979), as cases that reached the same interpretation of *United States* v. *Vermont*, *supra*. See App., *infra*, 11a-12a. Those three district court decisions cite *United States* v. *Vermont* for the conclusion that a general lien on "all" of a debtor's property is sufficiently specific to satisfy the requirement of *United States* v. *City of New Britain*, 347 U.S. at 86, that the lien must specifically identify the property to which it applies. See 640 F. Supp. at 414; 561 F. Supp. at 639; 474 F. Supp. at 906. None of these decisions, however, relies on *United States* v. *Vermont* for the proposition that a judgment lien has priority over a later-filed tax lien for property acquired after the tax lien is filed. Moreover, the present case does not involve a general judgment lien on "all" of the debtor's property; instead, this case concerns a judgment lien only in "real property" owned by the debtor (App., *infra*, 20a).

was "choate" before the federal tax lien was filed, the judgment lien has priority "regardless of whether after-acquired property is involved" (*ibid.*). The court of appeals noted (App., *infra*, 12a) that a similar conclusion was reached in *Wisconsin* v. *Bar Coat Blacktop, Inc.*, 640 F. Supp. 407 (W.D. Wis. 1986), where the court held that a first-filed lien that applies to "all" of a taxpayer's property has priority over a later-filed federal tax lien even as to property acquired after the tax lien is filed (*id.* at 415). See also *McAllen State Bank* v. *Saenz*, 561 F. Supp. 636 (S.D. Tex. 1982).

The court of appeals erred in its analysis in this case. A lien cannot be "choate" in property that does not belong to the taxpayer for the simple reason that, if the taxpayer does not own the property, the lien does not attach to it. It is only when the taxpayer acquires the property that the lien can attach and thereby become choate. *Iowa Fair Plan* v. *United States*, 257 N.W.2d at 629. See *Texas Oil & Gas Corp.* v. *United States*, 466 F.2d at 1048; *MDC Leasing* v. *New York Property Insurance Underwriting*, 450 F. Supp. at 181. It is only when the new property is acquired that the "property subject" to the lien is identified and the lien becomes choate (*United States* v. *City of New Britain*, 347 U.S. at 86).

Nothing in this Court's decision in *United States* v. *Vermont* supports the court of appeals' conclusion that a lien is "choate" in property that a taxpayer does not own. In *Vermont*, this Court did not address

whether the State's lien could attach to property that the taxpayer did not own; instead, that case concerned only whether a state lien in "all" the debtor's property sufficiently identified the debtor's bank accounts as "property subject to the lien" and therefore satisfied the "choateness" requirement of *United States* v. *City of New Britain*. See 377 U.S. at 354-355. The Court held in the *Vermont* case that the word "all" sufficiently describes the property to which it applies and that the State's lien was therefore "choate" as applied to the debtor's existing bank accounts. *Id.* at 355-358. In holding that the word "all" sufficiently described the property owned by the debtor, the Court did not hold that a lien can be choate in property that the taxpayer does *not* own. Nor is there any logical relationship between these two separate issues.

c. Other courts have adopted a still different analysis of this same issue. In *Southern Rock, Inc.* v. *B & B Auto Supply*, 711 F.2d 683 (1983), the Fifth Circuit held that when, as in the present case, a private lien and a federal tax lien attach to the same property at the same time, the competing lienors must share the proceeds of the property "in proportion to their claims." *Id.* at 689. In so holding, the court stated that the "notion that a tie goes to the government" is incorrect. *Ibid.*

Similarly, *United States* v. *Fleming*, 474 F. Supp. 904, 908 (S.D.N.Y. 1979), held that, when the federal and private liens attach to newly-acquired property simultaneously, there must be a pro rata sharing of the proceeds of the property. The court explained that this result flows from analogous state "common law" practices (*ibid.*):

> As to property of the debtor in existence at the time the liens arose, the common-law rule is "the first in time is the first in right." [*United States* v. *City of New Britain*,] 347 U.S. at 85. As to after-acquired property, the rule is that judgment liens in existence when the debtor acquired the property are to be satisfied *pro rata* out of that property.

It is, of course, well established that federal law, rather than state common law, determines the priority of federal tax liens. See *United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361, 364-365 (1953). Moreover, contrary to the conclusion reached by the courts in *Southern Rock* and *Fleming*, the established federal rule is that, unless the private lien becomes choate in the specific property in dispute before the federal lien is filed, the federal lien has "priority" not "parity." *Texas Oil & Gas Corp.* v. *United States*, 466 F.2d at 1047, 1052. See *MDC Leasing* v. *New York Property Insurance Underwriting*, 450 F. Supp. at 181.

2. The courts that have considered the question presented in this case have reached irreconcilably inconsistent conclusions. Depending upon the forum in which the issue is presented, when a private lien is filed before notice of a federal tax lien is filed, one of the following results will transpire: (i) the private lien will have priority in after-acquired property (*e.g.* App., *infra*, 12a-13a); (ii) the federal tax lien will have priority in after-acquired property (*e.g.*, *Iowa Fair Plan* v. *United States*, 257 N.W.2d at 629); or (iii) the private lien and the federal tax lien will share *pro rata* in the after-acquired property (*e.g.*, *United States* v. *Fleming*, 474 F. Supp. at 908). The conflict created by these widely disparate decisions can be resolved only by this Court.

The inconsistent treatment for lien priorities that results from the conflicting lower court decisions

creates significant confusion in the determination of creditors' rights. The question presented in this case is a commonly recurring one with substantial administrative importance. The disparate treatment afforded to creditors under these mixed decisions also has significant consequences for taxpayers, for unfulfilled tax obligations can have meaningfully different consequences for taxpayers than unfulfilled obligations to other types of creditors.

In the absence of a decision from this Court, the priority afforded a federal tax lien—and the consequent unfulfilled tax obligations of debtors—will vary depending solely upon the forum in which the issue is presented. Resolution of this recurring issue by this Court is needed to avoid continuing uncertainty and inconsistent application of the revenue laws.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

KENT L. JONES
Assistant to the Solicitor General

WILLIAM S. ESTABROOK
BRIDGET M. ROWAN
Attorneys

JANUARY 1992

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 90-4023

BRUCE J. MCDERMOTT and BETTY MCDERMOTT,
PLAINTIFFS

v.

ZIONS FIRST NATIONAL BANK, N.A.,
DEFENDANT-APPELLEE

UNITED STATES OF AMERICA, by and through
INTERNAL REVENUE SERVICE, DEFENDANT-APPELLANT

On Appeal from the United States District Court
for the District of Utah
(D.C. No. 88-C-0399G)

[Filed Oct. 2, 1991]

Before TACHA and SETH, Circuit Judges, and BRATTON, District Judge.*

BRATTON, District Judge.

---

* Howard C. Bratton, Senior District Judge of the United States District Court for the District of New Mexico, sitting by designation.

Plaintiffs, Bruce and Betty McDermott, brought this interpleader action to determine priority in the proceeds of a sale of real property. Zions First National Bank (Zions) claims a lien arising out of a judgment by a Utah state court against the McDermotts. The competing lien of the United States is a federal tax lien claimed by the Internal Revenue Service on behalf of the United States (IRS). Both parties moved for summary judgment, and the district court granted summary judgment in favor of Zions. The IRS has appealed; we affirm.

I.

Zions obtained its judgment for $67,977.67 against the McDermotts on June 22, 1987, and properly docketed the judgment in Salt Lake County on July 6, 1987. The lien attached to all of the McDermotts' real property and after-acquired property located in the county.[1] The IRS filed its Notice of Federal Tax Lien on September 9, 1987. Its lien attached to all of the McDermotts' owned and after-acquired real and personal property.[2] On September 23, 1987, the

[1] The relevant portion of the Utah statute provides:

> From the time the judgment of the district court or circuit court is docketed and filed in the office of the clerk of the district court of the county it becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in the county in which the judgment is entered, owned by him at the time or by him thereafter acquired during the existence of said lien.

Utah Code Ann. § 78-22-1 (1953).

[2] The federal tax lien is a "lien in favor of the United States upon all property and right to property, whether real or personal, belonging to such person." 26 U.S.C. § 6321 (1954). The lien also applies to after-acquired property. *Glass City Bank v. United States*, 326 U.S. 265 (1945) (interpreting

McDermotts acquired title to certain real property in Salt Lake County to which they already had a buyer, Bob Hansen. There is no evidence in the record that either Zions or the IRS attempted to execute on its lien prior to this time. However, in order to obtain title insurance for the property and complete the sale to Mr. Hansen, the title insurance company required the McDermotts to obtain releases from Zions and the IRS.

Accordingly, the parties entered into an escrow agreement in which Zions and the IRS released their claims to the real property itself but reserved their rights to the cash proceeds of the sale. In the agreement, the parties addressed the issue of priority by providing:

> The respective priorities of the parties to the cash proceeds shall be identical to the priorities of the respective liens of the parties as they existed against the real property as of September 23, 1987, after Bruce J. McDermott successfully bid and purchased the property at the Trustee's Sale, notwithstanding the change in form of the collateral.

The agreement also required the McDermotts to institute this interpleader action so that a court could determine who was entitled to priority in the net proceeds.[3]

The McDermotts were not strangers to the property they acquired. In 1981 they had entered into

Section 3670 of the Internal Revenue Code, the predecessor of 26 U.S.C. § 6321).

[3] The McDermotts originally brought the action in state court. The United States removed to federal court pursuant to 28 U.S.C. § 1442(a)(1). We have jurisdiction pursuant to 28 U.S.C. § 1291.

a Uniform Real Estate Contract (UREC) to sell this property to Ron Christensen and Gary Carter (C & C). Pursuant to the terms of the UREC, C & C paid $191,000.00 cash to the McDermotts and agreed to pay the balance of the purchase price monthly. The McDermotts accepted from C & C a Trust Deed Note in the amount of $146,000.00 and a Trust Deed securing the Note with C & C's interest in the property and C & C's interest was conveyed to the Trustee. Legal title to the property, however, remained with the McDermotts.[4]

C&C defaulted on their obligations under the Trust Deed Note in early 1986. Befoer the Trustee could hold a sale of the property, C & C assigned their interest in the UREC to C & C Investments. C & C Investments subsequently filed a petition for bankruptcy, and a pending sale was stayed. During the bankruptcy proceedings, the McDermotts gave C & C time to find a buyer for the property and, as consideration, released their interest in the UREC. C & C did not find a buyer, and by August 1987 the McDermotts succeeded in getting the property released from the bankruptcy estate and the Trustee noticed the sale. The McDermotts repurchased the property at the sale by submitting a credit bid and assuming an underlying mortgage.

II.

The district court held that Zions had priority because its lien was filed "first in time." The court applied the "first in time, first in right" rule after

[4] Under the doctrine of equitable conversion, a real estate contract acts to transfer equitable title to real estate to the buyer, while legal title remains with the seller. *Butler v. Wilkinson*, 740 P.2d 1244, 1255 n.5 (Utah 1987).

finding that the liens simultaneously attached to the real property on September 23, 1987. In addition, the court found that in the Escrow Agreement the IRS waived any interest it might have had in the UREC as personalty and the proceeds of that personalty. The court assumed, but did not decide, that the IRS lien had attached to the McDermotts' interest in the real estate contract and that Zions' lien did not.

We review a grant of summary judgment by examining the record to determine whether there are any remaining genuine issues of material fact and whether the district court correctly applied the substantive law. We will affirm if any proper ground exists to support the district court's decision. *United States v. State of Colo.*, 872 F.2d 338, 339 (10th Cir. 1989); *Setliff v. Memorial Hosp. of Sheridan County*, 850 F.2d 1384, 1391-92 (10th Cir. 1988). Our review is *de novo*. *Croft v. Harder*, 927 F.2d 1163, 1164 (10th Cir. 1991). In this case there are no facts in dispute and we find that the district court was correct that Zion's lien had priority over the IRS lien. However, as we explain in Part IIIB of this opinion, we differ from the district court in that we apply Congressional and regulatory directive, rather than the common law rule of "first in time, first in right."

III.

In this appeal, the IRS argues it did not waive its claim to the McDermotts' interest in the UREC and therefore it should have priority because its lien attached to the UREC before Zions' lien attached to the real property. In the alternative, the IRS argues it has priority because Zions' lien was not "choate" at the time the IRS filed its Notice of Tax Lien as the McDermotts did not yet own the real property at issue. Finally, the IRS claims that, if nothing else, it

should share pro-rata in the fund. We will address each argument in turn.

A.

The Escrow Agreement provided that

> "[t]he monies placed in escrow shall be in lieu of all legal and equitable rights of the IRS and Zions to the real property releases [sic] by them as part of this agreement. Neither party hereto waives any rights, defenses and claims that they may have had or any of them may have had in any interest in and to the real property, such rights being reserved and shall apply to the cash proceeds being held in escrow in substitution of the subject real property."

The construction of a contract is a question of law for the court. *Resort Car Rental System, Inc. v. Chuck Ruwart Chevrolet, Inc.*, 519 F.2d 317, 320 (10th Cir. 1975). We agree with the district court that the plain language of the agreement shows that both Zions and the IRS intended to attach their liens to a particular piece of real property, the subject of the sale to Mr. Hanson.[5]

[5] Whatever interest in real or personal property the McDermotts had prior to September 23, 1987, was not crucial to the decision below, and we do not make that decision here. The district court based its ruling on the fact that the parties entered an agreement indicating that their liens would attach to particular real property owned by the McDermotts after September 23, 1987. We do note, however, that prior to a 1990 decision of the Utah Court of Appeals, now pending on certiorari in the Utah Supreme Court and contrary to the district court's assumption, it was not clear in Utah whether or not a judgment lien could attach to a vendor's interest in a real estate contract. In *Cannefax v. Clement*, 786 P.2d 1377 (Utah App.), *cert. granted*, 795 P.2d 1138 (1990), the Utah Court of Appeals held for the first time in Utah that a vendor in a real estate contract had no property rights to which a state judgment lien could attach. The dissent in *Cannefax* disagreed with the majority and referred to a statement in an earlier Utah Supreme Court opinion indicating that a judgment lien could attach to a vendor's interest in a real estate contract. *Id.* at 1383-91 (Bullock, J. dissenting) (quoting *Butler v. Wilkinson*, 740 P.2d 1244, 1258 (Utah 1987)). The district court's decision is dated January 17, 1989, prior to *Cannefax*. Furthermore, the McDermotts appear to have released their interest in the UREC during the bankruptcy proceedings. Of course, the federal lien may have also attached to the McDermotts' beneficial interest in the Trust Deed, but that point has never been argued by the IRS.

B.

Often, the first question to be addressed in a case involving priority of a federal tax lien is whether or not the taxpayer has rights in particular property to which the federal lien could attach. That question is resolved by state law. *See, e.g., Aquilino v. United States*, 363 U.S. 509, 512-13 (1960); *Bigheart Pipeline Corp. v. United States*, 835 F.2d 766, 767 (10th Cir. 1987). However, in this case the parties removed the state law issue of property rights by implicitly agreeing in the Escrow Agreement that their lien would attach to certain real property owned by the McDermotts. Accordingly, the only issue remaining is the priority of the two competing liens.

Federal law determines priority between federal tax liens and state-created liens. *United States v. Equitable Life Assurance Soc'y of the U.S.*, 384 U.S. 323, 328 (1966); *Allan v. Diamond T Motor Car Co.*, 291 F.2d 115, 116 (10th Cir. 1961). Under federal law, judgment lien creditors are among certain creditors who have priority over federal tax liens when their liens are fully perfected and "choate"

prior to the filing of the federal government's Notice of Tax Lien. 26 U.S.C. § 6323(a); 26 C.F.R. § 301.6323(h)-1(g); *see also United States v. Pioneer Am. Ins. Co.*, 374 U.S. 84, 89 (1963). All other creditors have priority over federal tax liens if their liens were fully perfected and choate before the federal tax lien arose at the time of assessment. *United States v. City of New Britain*, 347 U.S. 81, 85-86 (1954); 28 U.S.C. § 6322.[6]

---

[6] Congress has accorded judgment creditors priority over unfiled tax liens since 1913. Act of March 4, 1913, ch. 166, 37 Stat. 1016. Prior to this law, federal tax liens, which arise upon assessment, were secret liens that prevailed over all other subsequent creditors. *See generally* Plumb, Federal Liens and Priorities—Agenda for the Next Decade, 77 Yale L.J. 228, 229 (1967). The original priority statute protected purchasers, mortgages and judgment creditors. In 1939, the statute was amended to include pledgees. Revenue Act of 1939, § 401, 53 Stat. 882. The current statute, enacted in 1966, protects purchasers, holders of security interests, mechanic's lienors, and judgment lien creditors. The statute provides: "The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary." 26 U.S.C. 6323(a) (1966).

The Supreme Court originated the doctrine of "choate" liens in *Spokane County v. United States*, 279 U.S. 80 (1929), in the context of priority of liens where the debtor was insolvent. The Court extended the doctrine in *United States v. Security Trust & Sav. Bank, Executor*, 340 U.S. 47 (1950), to priority contests between federal tax liens and liens not named in the priority statute recited above, where the debtor was solvent. Finally in *United States v. Pioneer Am. Ins. Co.*, 374 U.S. 84 (1963), the Court held that liens mentioned in the priority statute also needed to be choate in order to prime a filed federal tax lien. *See generally* Kennedy, *From Spokane*

Whether or not a lien is choate is a federal question. *United States v. Security & Sav. Bank, Executor*, 340 U.S. 47, 49-50 (1950). For a prior lien on *all* of a person's real or personal property to take priority over a federal tax lien, the lien must be "perfected in the sense that there is nothing more to be done to have a choate lien—when the identity of the lienor, the property subject to the lien, and the amount of the lien are established." *City of New Britain*, 347 U.S. at 84; *see also United States v. Vermont*, 377 U.S. 351 (1964).

The Treasury Department has incorporated the judicially-created "choateness" doctrine into its definition of "judgment lien creditor" for purposes of 25 U.S.C. § 6323(a).

> The term "judgment lien creditor" means a person who has obtained a valid judgment, in a court of record and of competent jurisdiction, for the recovery of specifically designated property or for a certain sum of money. In the case of a judgment for the recovery of a certain sum of money, a judgment lien creditor is a person who has perfected a lien under the judgment on the property involved. *A judgment lien is not perfected until the identity of the lienor, the property subject to the lien, and the amount of the lien are established.* Accordingly, a judgment lien does not include an attachment or garnishment lien until the lien has ripened into judg-

---

County to Vermont: The Campaign of the Federal Government Against the Inchoate Lien, 50 Iowa L. Rev. 724 (1965).

In the Federal Tax Lien Act of 1966, Congress specifically altered the choateness doctrine with respect to certain transactions. *See* 26 U.S.C. 6323(b)-(e); *Donald v. Madison Indus., Inc.*, 483 F.2d 837, 840 (10th Cir. 1973).

ment, even though under local law the lien of the judgment relates back to an earlier date. If recording or docketing is necessary under local law before a judgment becomes effective against third parties acquiring liens on real property, a judgment lien under such local law is not perfected with respect to real property until the time of such recordation or docketing. If under local law levy or seizure is necessary before a judgment lien becomes effective against third parties acquiring liens on personal property, then a judgment lien under such local law is not perfected until levy or seizure of the personal property involved. The term "judgment" does not include the determination of a quasi-judicial body or of an individual acting in a quasi-judicial capacity such as the action of State taxing authorities.

See 26 C.F.R. § 301.6323(h)-1(g) (emphasis added). *Cf. United States v. Acri*, 348 U.S. 211 (1955) (attachment lien not choate because fact and amount of lien contingent); *Security Trust*, 340 U.S. at 50 (attachment lien "merely a *lis pendens* notice that a right to perfect a lien exists").

The IRS does not argue that Zions' lien falls within any of the exceptions noted in the regulation other than that at the time the IRS filed its notice "the property subject to the lien had not been established." Although the Supreme Court has not addressed this particular situation—where the IRS and the judgment creditor are clearly claiming after-acquired property, we believe that *United States v. Vermont*, 377 U.S. 351 (1964), stands for the proposition that a non-contingent, or choate, lien on all of a person's real property, perfected prior to the federal tax lien, will take priority over the federal lien, regardless of whether after-acquired property is involved.

In *United States v. Vermont*, Vermont and the United States held almost identical tax liens, arising upon assessment, upon all the taxpayer's real and personal property. Vermont's lien arose October 21, 1958, and the federal lien arose February 9, 1959. After the federal lien arose, Vermont attempted to reach certain funds owing to the taxpayer and held by a bank.[7] *Id.* at 352-53. The United States argued, as it argues here thirty years later, that a state-created lien had to attach to specific property in order for it to take priority. *See id.* at 355. The Supreme Court, while noting that the federal lien would take priority if the debtor were insolvent,[8] ruled that because Congress provided no special rules for priority of tax liens arising under section 6321, the basic rule of "first in time, first in right" would apply. *Id.* at 357-58. The Court went on to hold that even though both liens were general, both were equally perfected as to all the taxpayer's property and were choate. *Id.* at 358-59. Therefore, when both governments attempted to satisfy their liens with the same property,

---

[7] Because the state lien was not one mentioned in 26 U.S.C. § 6323, the Court determined the federal priority by the date of assessment and demand, not by the date of notice filing. *United States v. Vermont*, 377 U.S. at 353 n.3.

[8] The federal government had absolute priority in situations where the debtor was insolvent and his property was in the hands of a receiver. Rev. Stat. § 3466, 31 U.S.C. § 191 (R.S. 3466). For any prior creditor to take priority he would have had to attach specific property, reduce it to possession, and have it removed from the control of the receiver. *See United States v. City of New Britain*, 347 U.S. 81, 85 (1954); *United States v. Gilbert Assoc., Inc.*, 345 U.S. 361 (1953). It was in the context of R.S. 3466 that the Supreme Court originated the choateness rules. See footnote 6.

the government whose lien arose first, Vermont, would take priority. *Id.* at 354, 359.

Just as Vermont's lien was choate and entitled to priority, Zions' lien was choate and entitled to priority. Zions' lien was not contingent, it was docketed, specific in amount, and fully enforceable against any real property owned by the McDermotts in Salt Lake County during the pendency of the lien. We agree with the cases cited by Zions interpreting *Vermont* to apply to property acquired by the debtor after perfection of the lien as well as to property owned by the debtor at the time the lien was perfected. *See State of Wis. v. Bar Coat Blacktop, Inc.*, 640 F. Supp. 407, 414 (W.D. Wis. 1986); *McAllen State Bank v. Saenz*, 561 F. Supp. 636, 639 (S.D. Tex. 1982); *United States v. Fleming*, 474 F. Supp. 904, 906 (S.D.N.Y. 1979). *See also* Plumb, Federal Tax Liens 134-35 (3d ed. 1972) ("the typical general judgment lien on 'all' the debtor's real property seems safe from later tax liens").

The IRS has not referred us to any federal authority for the rule it proposes. The only court of appeals case cited by the IRS, *MDC Leasing Corp. v. New York Property Insurance Underwriting Assoc.*, affirms a district court opinion holding that an assignment of insurance proceeds not reduced to judgment is not sufficiently choate to prime a federal tax lien. 603 F.2d 213 (2d Cir. 1979), *aff'g without opinion* 450 F. Supp. 179 (S.D.N.Y. 1978). The district court, in dictum, had stated that because the liens attached simultaneously to the after-acquired proceeds the federal tax lien would take priority. *MDC Leasing Corp.*, 450 F. Supp. at 181. The authority for that proposition was *United States v. Graham*, 96 F. Supp. 318 (S.D. Cal. 1951), *aff'd sub nom. State of California v. United States*, 195 F.2d 530 (9th Cir.), *cert. denied*, 344 U.S. 831 (1952). The *Graham* holding rested on the fact that the state's right to set-off was not choate and could not prime the federal tax lien. Again in dictum, the court stated without citing to any authority that federal liens are superior to simultaneously attaching interests. *Id.* at 321. The dicta from these cases do not support the general proposition that a federal tax lien has priority over a fully choate judgment lien when both liens seek to reach property acquired after the perfection of each lien.

In sum, although the district court's result was correct, we believe the problem is more properly analyzed under the federal priority statute, 26 U.S.C. § 6323(a), the Treasury Department's definition of "judgment lien creditor" found at 26 C.F.R. § 301.6323(h)-1(g), and the Supreme Court's definition of a choate lien. There was no need to resort to the federal common law rule of "first-in-time, first-in-right," because Congress has made clear in section 6323(a) and its predecessors that judgment lien creditors who perfect their liens before the filing of a federal tax lien have priority.

C.

Finally, the IRS presents *Southern Rock, Inc. v. B & B Auto Supply*, 711 F.2d 683 (5th Cir. 1983), as authority for its suggestion that it share pro-rata in the proceeds with Zions. *Southern Rock* involved two liens which were *perfected* simultaneously. The IRS and the secured creditor filed their notice and financing statement at exactly the same time. *Id.* at 684. Because the court could find no cases involving simultaneous perfection (as opposed to simultaneous attachment), the court applied the common law and

let the two claimants share pro-rata in a fund consisting of proceeds from accounts receivable. *Id.* at 689. Accordingly, *Southern Rock* is not precedent for us to ignore the clear priority of Zions' judgment lien.

In *United States v. Fleming*, 474 F. Supp. 904 (S.D.N.Y. 1979), the court was presented with competing city, state, and federal tax liens seeking to reach after-acquired personal property (gold coins). After finding that the non-federal liens were indeed choate, *id.* at 906, the court incorrectly looked to state law and held that the proceeds of the sale of the coins should be distributed pro-rata between the claimants. *See id.* at 908. However, the law is clear that once a taxpayer's rights in property are determined, the consequences which flow from those rights are to be determined by federal law. *Aquilino v. United States*, 363 U.S. 509 (1960); *United States v. Cache Valley Bank*, 866 F.2d 1242, 1244 (10th Cir. 1989). The federal law is either the common law rule "first in time, first in right," *City of New Britain*, 347 U.S. 81, 85 (1953), or the statutory rule found in 26 U.S.C. § 6323.[9]

IV.

We realize the importance of the federal government's and indeed the entire citizenry's interest in collecting our taxes. However, "[t]he purpose of

---

[9] The IRS includes the *Fleming* case in its brief, but not to show that the proceeds should be divided pro-rata. Instead, the IRS tells us that *Fleming*'s holding that the local liens were choate should be disregarded because the court erred in relying on state law. We note that the court correctly relied on *United States v. Vermont* to find that the liens were indeed choate and erred only in applying state law to the priority question.

[section 6323(a)] is to prevent secret tax liens from being effective against named classes of claimants to a delinquent taxpayer's property." *Marteney v. United States*, 245 F.2d 135, 140 (10th Cir. 1957). The federal tax lien in this case was "secret" on July 6, 1987, when Zions became a judgment lien creditor entitled to the protection of section 6323(a). Zions' lien was perfected and choate within the meaning of the statute, the regulation, and the case law as to all the McDermotts' real property. Accordingly, the IRS lien was not "valid" as to Zions' judgment lien.

The judgment of the United States District Court for the District of Utah is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH—CENTRAL DIVISION

Civil No. 88-C-0399G

BRUCE J. MCDERMOTT, ET AL., PLAINTIFFS

vs.

ZIONS FIRST NATIONAL BANK, N.A., ET AL.,
DEFENDANTS

MEMORANDUM DECISION AND ORDER

[Filed Jan. 17, 1989]

This matter came before the court on December 1, 1988 pursuant to the parties' respective cross Motions for Summary Judgment. The United States was represented by Kirk C. Lusty, and Zions First National Bank ("Zions Bank") was represented by T. Richard Davis. Counsel submitted legal memoranda and presented oral argument. The court took the matter under advisement but allowed the parties to file supplemental memoranda without further argument, which memoranda were filed on December

22, 1988. Being now fully advised, the court enters its Memorandum Decision and Order.

FACTUAL BACKGROUND

This interpleader action originally was brought in state court, but subsequently was removed by the United States to this court pursuant to 28 U.S.C. § 1442(a)(1). The case involves the determination of the relative priorities of a federal tax lien and a judgment lien to the proceeds from the sale of certain real property to which the liens purportedly attach.

On August 21, 1981, the McDermotts, as the fee simple owners of certain real property located in Salt Lake City, Utah, entered into a Uniform Real Estate Contract with Ron W. Christensen and Gary L. Carter ("buyers") for the sale of that property by the McDermotts. On the same date, the McDermotts accepted from the buyers a Trust Deed Note in the amount of $146,000.00 and a Trust Deed on the property securing the Note with the buyers' interest in the property, notwithstanding the fact that legal title to the property remained vested in the McDermotts.

On June 22, 1987, a judgment was entered in the Third Judicial District Court of Salt Lake County, State of Utah, against Bruce McDermott and in favor of Zions Bank in the amount of $67,977.67 together with post-judgment interest and attorneys fees, which judgment was docketed on July 6, 1987. On September 9, 1987, the Internal Revenue Service ("IRS") filed a Notice of Federal Tax Lien with the Salt Lake County Recorder's Office alleging that the McDermotts have an unpaid tax liability to the government in the amount of $103,657.93. On September 23, 1987, after the buyers had defaulted on their payment obligations under the Trust Deed Note, the McDermotts commenced a power of sale foreclosure on

the property as authorized by the Trust Deed. The high bidder at the Trustee's sale was Bruce McDermott, who purchased the property with a bid of $305,074.63, which included assumption of the underlying obligation of $119,950.00 and a credit bid of $185,124.63 as against the defaulted Trust Deed Note.

On March 4, 1988, the McDermotts sold the property to Robert R. Hansen and Helen A. Hansen (the "Hansens"). In connection with that sale, the parties to this lawsuit entered into an Earnest Money Agreement under which the net proceeds of the sale totaling $135,575.50 were paid to the clerk of this court in contemplation of this interpleader action pursuant to the terms of an Escrow Agreement.[1] The Escrow Agreement also provides that the proceeds on deposit shall be distributed in accordance with the priorities of the parties' respective liens as they existed against the real property on September 23, 1987, the date Bruce McDermott reacquired the property at the Trustee's sale.[2]

---

[1] ¶ 7 of the Escrow Agreement provides:

> Escrow Agent shall hold all case proceeds after payment of the items set forth in paragraph 2 herein until presented with an Order of the United States District Court directing the payment of said proceeds to the Clerk of the United States District Court or other designated party. An interpleader action shall be filed with the United States District Court by McDermott immediately after all terms of paragraph 6 of this Agreement have been satisfied.

[2] ¶ 3 of the Escrow Agreement provides:

> It is understood that the releases delivered herewith by the IRS and Zions are unconditional. *The monies placed in escrow shall be in lieu of all legal and equitable rights of the IRS and Zions to the real property releases by them as part of this agreement.* Neither party hereto waives any rights, defenses and claims that they may have had or any of them may have had in any interest in and to the real property, such rights being reserved and shall apply to the cash proceeds being held in escrow in substitution of the subject real property. *The respective priorities of the parties to the cash proceeds shall be identical to the priorities of the respective liens as they existed against the real property as of September 23, 1987, after Bruce J. McDermott successfully bid and purchased the property at the Trustee's Sale,* notwithstanding the change in form of collateral.

(Emphasis added.)

ANALYSIS

In determining the relative priority of federal tax liens and the liens of third parties asserted against a taxpayer's property, the court is confronted with two questions. First, "whether and to what extent the taxpayer had 'property' or 'rights to property' to which the tax lien could attach. *Aquilino v. United States*, 363 U.S. 509, 512 (1960). In resolving that question, the court "must look to state law." *Id.* at 512-13; *Tillery v. Parks*, 630 F.2d 775, 776 (10th Cir. 1980). The second question involves the rights of the parties to the property, which is answered by reference to federal law. *See United States v. Equitable Life Assur. Co.*, 384 U.S. 323, 330 (1966); *Aquilino*, 363 U.S. at 513-14; *United States v. Hershberger*, 475 F.2d 677, 681-82 (10th Cir. 1973).

I. NATURE OF PROPERTY RIGHTS RETAINED BY SELLER UNDER CONTRACT TO SELL REAL PROPERTY

Turning to the first question, when the McDermotts entered into the Uniform Real Estate Contract with the buyers on August 21, 1981, they retained

legal title to the property as security for the purchase price. *See Butler v. Wilkinson*, 740 P.2d 1244, 1254 (Utah 1987). However, upon entering into the contract of sale, the doctrine of equitable conversion came into play so that the McDermotts' interests became "an interest in *personalty* and not . . . one in realty . . ." *Id.* at 1255 (emphasis added); *see also Lach v. Deseret Bank*, 746 P.2d 802, 805 (Utah Ct. App. 1987).[3] Under Utah's judgment lien statute, a docketed judgment "becomes a lien upon all the *real* property of the judgment debtor . . . in the county in which the judgment is entered, owned by him at the time or by him thereafter acquired during the existence of said lien . . ." Utah Code Ann. § 78-22-1 (1987) (emphasis added). Under this statute, by reason of the judgment entered against the McDermotts, Zions Bank obtained a lien upon all of the McDermotts' real property on July 6, 1987, the date Zions' judgment was docketed. As of that date, however, the McDermotts had no *real property* interest in the subject property to which the judgment lien could attach.

---

[3] In *Lach v. Deseret Bank*, 746 P.2d at 805, the court stated: The doctrine of equitable conversion provides that "an enforceable executory contract of sale [upon which an action for specific performance could be brought] has the effect of converting the interest of the vendor of real property to personalty." *Wilson v. State Tax Commission*, 28 Utah 2d 197, 499 P.2d 1298, 1300 (1972) (quoting *Allred v. Allred*, 15 Utah 2d 396, 393 P.2d 791, 792 (1964)). The purchaser acquires the equitable interest in the property at the moment the contract is created and is thereafter treated as the owner of the land. *Jelco, Inc. v. Third Judicial District Court*, 29 Utah 2d 472, 511 P.2d 739, 741 (1973).

The federal tax lien statute, on the other hand, provides that the amount of a delinquent taxpayer's liability "shall be a lien in favor of the United States upon *all property and rights to property, whether real or personal*, belonging to such person." 26 U.S.C. § 6321 (1954) (emphasis added). Accordingly, as of September 9, 1987, the date of filing its notice of lien, the IRS obtained a lien on the personal property of the McDermotts, which included their sellers' interest in the subject property. However, the IRS obtained no lien on the buyers' interest because the McDermotts had not yet reacquired the property and had no real property interest therein.

II. RELATIVE PRIORITIES OF LIEN CLAIMANTS IN SIMULTANEOUSLY OBTAINED LIENS ON REAL PROPERTY

Zions Bank and the IRS stipulated in the Escrow Agreement that the relative priorities of the lien claimants to the proceeds of sale were to be the same as the priorities of the respective liens after Bruce McDermott reacquired the property on September 23, 1987.[4] On that date, as the successful bidder at the Trustee sale, the McDermotts became the holder of the equitable and legal title to the property. At that point in time the liens of the competing claimants simultaneously attached as against the merged interests in real property. Because of the agreement of the parties, which appears to have varied the priorities to the sale proceeds, it becomes necessary to determine the relative priorities of simultaneously at-

---

[4] *See supra* note 2.

taching liens to the McDermotts' after-acquired property.[5]

This court considers that the federal rule of "first in time, first in right" should be applied to the competing liens on the real property at issue here. *See Wisconsin v. Bar Coat Blacktop, Inc.*, 640 F.Supp. 407, 414 (W.D. Wis. 1986); *McAllen State Bank v. Saenz*, 561 F.Supp. 636, 639 (S.D. Tex. 1982); *United States v. Fleming*, 474 F.Supp. 904, 908 (S.D.N.Y. 1979). Application of that rule "encourages the diligent filing of liens whether or not after-acquired property is involved." *McAllen State Bank*, 561 F.Supp. at 640. Zions Bank's judgment lien was perfected as to all real property then owned and *thereafter* acquired by the McDermotts as of July 6, 1987, the date of docketing.[6] The federal tax lien was so perfected as of September 9, 1987, the date the IRS filed the lien with the Salt Lake County Recorder's Office.[7] Accordingly, the court concludes that

---

[5] As with Zions' judgment lien, the tax lien of the IRS extends to after-acquired property. *See Glass City Bank v. United States*, 326 U.S. 265, 267 (1945).

[6] Utah Code Ann. § 78-22-1 (1987).

[7] During oral argument counsel for the United States asserted that a federal tax lien gains priority status based upon the assessment date of the taxes rather than the date the tax lien was filed. The court does not agree. 26 U.S.C. § 6323(a) (1954) provides: "The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or *judgment lien creditor* until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary or his delegate." (Emphasis added.) The definition of "judgment lien creditor" as used in § 6323(a) is set forth in 26 CFR § 301.6323(h)-1(g) (1988) as

> a person who has obtained a valid judgment, in a court of record and of competent jurisdiction, for the recovery of specifically designated property or for a certain sum of money. In the case of a judgment for the recovery of a certain sum of money, a judgment lien creditor is a person who has perfected a lien under the judgment on the property involved. A judgment lien is not perfected until the identity of the lienor, the property subject to the lien, and the amount of the lien are established. Accordingly, a judgment lien does not include an attachment or garnishment lien until the lien has ripened into judgment, even though under local law the lien of the judgment relates back to an earlier date. If recording or docketing is necessary under local law before a judgment becomes effective against third parties acquiring liens on real property, a judgment lien under such local law is not perfected with respect to real property until the time of such recordation or docketing . . .

The lien of Zions Bank pursuant to the docketed judgment clearly fits within the definitional requirements of the regulation. The holder of a security interest in a debtor's property, including a judgment lien, is protected against a federal tax lien if before the IRS files notice of its lien, the security interest is in existence, even if it came into existence after the date of assessment. *See Morrison Flying Serv. v. Deming Nat'l Bank*, 404 F.2d 856, 863 (10th Cir. 1969).

[8] Steven F. Alder claims $11,815.48 of the proceeds on deposit for attorneys fees allegedly incurred in the representation of the McDermotts for the collection and liquidation of the Trust Deed Note. Mr. Alder filed a motion for summary judgment alleging his entitlement to such funds, but later withdrew the motion conceding that disputed material facts must be resolved.

the lien of Zions Bank has priority and must be paid and satisfied in full prior to payment to the IRS for its subsequently filed lien.

Based upon the foregoing analysis, Zions Bank's Motion for Partial Summary Judgment is granted, and the IRS's Motion for Partial Summary Judgment is denied.[8] Counsel for Zions Bank is directed to pre-

pare and submit to the court a form of judgment and directive to the Escrow Agent consistent with this Memorandum Decision and Order after compliance with local Rule 13(e).

DATED: January 17, 1989.

/s/ J. Thomas Greene
J. THOMAS GREENE
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 90-4023

BRUCE J. MCDERMOTT and BETTY B. MCDERMOTT,
PLAINTIFFS

v.

ZIONS FIRST NATIONAL BANK,
DEFENDANT-APPELLEE

and

STEVEN F. ADLER, DEFENDANT-CROSS-CLAIMANT

v.

THE UNITED STATES OF AMERICA by and through
the INTERNAL REVENUE SERVICE,
DEFENDANT-CROSS CLAIM DEFENDANT-APPELLANT

JUDGMENT

Entered October 2, 1991

Before TACHA, SETH, Circuit Judges, and BRATTON, District Judge.*

---

* Honorable Howard C. Bratton, Senior District Judge of the United States District Court for the District of New Mexico, sitting by designation.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Utah, and was argued by counsel. .

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Entered for the Court

ROBERT L. HOECKER
Clerk

/s/ Patrick Fisher
By: PATRICK FISHER
Chief Deputy Clerk

☆ U. S. GOVERNMENT PRINTING OFFICE, 1982 512324 45256